United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,358

344

UNITED STATES OF AMERICA,

Appellant,

v.

LEONARDA M. VDA DE LUBAY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

TABLE OF CONTENTS

DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Proceedings 2249-64

Date		
1964	Deposit for cost by	
Sep. 11	Complaint, appearance, Annex A, B & C	filed
Sep. 11	Summons, copies (2) and copies (2) of Complaint issued DA ser 9/14/64. AG ser 9/16/64	
Nov. 16	Order appointing Robert L. Pillote as atty for pltf. (N)	Tamm, J.
Nov. 23	Consent order extending time to answer to and including 12/31/64. (N)	Tamm, J.
1965		
May 27	Consent order further extending time to answer to and including 6/21/65. (N)	Youngdahl, J.
Jun 24	Answer of deft to complaint; c/s 6/24/65. Appearance of John W. Douglas, Russell Chapin and David V. Seaman, Dept. of Justice.	filed
Jun 24	Calendared (AC/N) (N).	
Jun 25	Consent order extending deft's time to defend to and including June 30, 1965. (N)	Youngdahl, J.
Jul 16	Consent order adding Rodante Lubay as party deft. (N)	Robinson, J.
Jul 20	Summons, copy & copy of complaint, answer & order to deft. #2	
Jul 22	Affidavit of mailing copy of complaint; summons & order; 7/20/65	filed
Oct 6	Exhibit "A" by deft #1.	filed
Oct 6	Affidavit in support of default.	filed

[DOCKET ENTRIES]

Oct 6	Default vs defendant Rodante Lubay. (M)	(BY CLERK)
Oct 27	Called.	Pretrial Examiner
1966		
Mar 16	Motion of deft for judgment on pleadings or for summary judgment; exhibits A thru H; c/m 3/15/66; statement; P&A. M.C. 3/16/66.	filed
Apr 5	Opposition of deft to pltfs motion for summary judgment; statement; c/m 4/5/66; exhibits A & B; P&A; M.C. 4/5/66.	filed
Apr 27	Order denying motion of defendant United States for judgment on pleadings or summary judgment vs. plaintiff; granting plaintiff's motion for summary judgment; granting cross-motion for summary judgment vs. defendant Rodante Lubay; defendant Rodante Lubay to take nothing herein; defendant United States directed to pay to plaintiff remaining death benefits of gratuitous National Service Life Insurance, commencing as of February 13, 1957, less 10% of all such payments to be paid to plaintiff's attorneys. Micro 4/28/66	Holtzoff, J.
June 24	Notice of appeal of deft. (Copy mailed to Robert Pillote)	filed
July 5	Transcript of proceedings; 4/22/66; Vol I, pp. 1-21 (Rep: Gerald Nevitt) Court's Copy.	filed
July 29	Record on Appeal delivered to USCA; Frank Q. Nebeker, Asst. U.S. Atty - No charge. (Clerk's Fee $1.10)	
July 29	Receipt from USCA for Oroiginal Record.	filed

COMPLAINT

[Filed September 11, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LECHARDA M. VDA DE LUBAY
No. 1219-1221 P. Guevara St.
(2nd floor)
Sta. Cruz, Manila, Philippines

Plaintiff,

VERSUS

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 2249-64

Re: XC 6 327 794
LUBAY, Antonio M.

C O M P L A I N T (Insurance)

Comes now the plaintiff in the above styled case and to this Honorable Court respectfully alleges:

1. That plaintiff is a Filipino Citizen, 39 years old, widow of the late veteran, ANTONIO M. LUBAY, residing and with postal address at No. 1219-1221 P. Guevara Street (2nd floor), Sta. Cruz, Manila, Philippines.

2. That defendant is the United States Government of America.

3. That plaintiff filed claims for gratuitous National Service Life Insurance and death compensation benefits with the U. S. Veterans Administration, Manila Regional Office, Philippines, sometime in 1946 based on the service performed by the late veteran husband, ANTONIO M. LUBAY, who was killed in the concentration camp at Capas, Tarlac, Philippines.

4. That plaintiff's claim for gratuitous National Service Life Insurance and death compensation benefits were approved and plaintiff was then receiving monthly compensation award and gratuitous National Service Life Insurance' award up to the month of November, 1956, when at a sudden her award of gratuitous National Service Life Insurance and death compensation were terminated by the defendant thru the Veterans Administration on the ground that plaintiff has allegedly remarried.

5. That plaintiff appealed her case to the Board of Veterans Appeals but her appeal was denied by the Board of Veterans Appeals.

6. That plaintiff had requested the Chairman, Board of Veterans Appeals to reconsider her appeal by reviewing plaintiff's evidences submitted but in a letter dated March 16, 1960, signed by Mr. James W. Stancil, Chairman, Board of Veterans Appeals, her request had been likewise denied. Letter dated March 16, 1960, is herewith attached and makes the same a part of this complaint fully as if stated herein and marked as annex "A".

7. That plaintiff informs this Honorable Court that the termination of her monthly award of gratuitous National Service Life Insurance and death compensation benefits was improper, even without the benefit of the provisions of 38 CFR 13.402(d), plaintiff not being remarried within the contemplation of the provisions of 38 CFR 3.49, the true fact being that there is not even a semblance of marriage contracted by the plaintiff, although she admits to having been disgraced by SERGIO DE CASTRO, neither plaintiff has lived with the same man as his wife.

8. That plaintiff in support of her contentions is submitting to this Honorable Court her sworn statement and makes the same a part of this complaint fully as if stated herein and marked as annex "B"; likewise plaintiff is submitting to this Honorable Court joint-affidavit of disinterested persons who have full knowledge of plaintiff's marital status belying that plaintiff has remarried and makes the same a part of this complaint fully as if stated herein and marked as annex "C".

9. That in spite of repeated demands from the plaintiff for the restoration of her monthly award of gratuitous National Service Life Insurance and death compensation benefits, the defendant thru the Veterans Administration arbitrarily and capriciously continues to refuse the restoration of her death benefits to the prejudice of the plaintiff.

10. That the amount of relief sued upon by the plaintiff is the remaining unpaid installments of $5,000.00.

11. That there is no more adequate remedy for the recovery of the amount of relief described herein other than to take this action to this Honorable court for judgment.

WHEREFORE, premises considered, plaintiff most respectfully prays that this Honorable Court

(a) Declare that plaintiff is the UNREMARRIED widow of the late veteran husband, ANTONIO LUBAY, and
(b) Issue a peremptory order to the Administrator of Veterans Affairs to review plaintiff's claim in the light of the Court's declaration and to resume payments of her award of gratuitous National Service Life Insurance to commence on the date of last payment, and
(c) Grant such other reliefs that this Honorable Court may seem just and equitable, and
(d) Exempt plaintiff from paying cost of surety bond because plaintiff is poverty-stricken, and

WITH A CONCLUDING PRAYER that this Honorable Court will please appoint WALLACE, LEECH & FILLORE (Law Office) as plaintiff's attorney of record and to deduct ten percentum (10%) from the claim as plaintiff's attorney fees if the claim is successful.

June 8, 1964, Manila, Philippines for Washington, D. C.

/s/ Leonarda M. Vda de Lubey
LEONARDA M. VDA DE LUBAY
-Plaintiff-

Annex "A"

VETERANS ADMINISTRATION
Munitions Bldg
Washington 25, D. C.

March 16, 1960

XC 6 327 794
LUBAY, Antonio M.

Mrs. Leonarda M. Vda de Lubey
Candelaria, Quezon
Philippines

Dear Mrs. Lubey:

We have your letter of February 23, concerning the action taken by the Board of Veterans Appeals on your appeal for death compensation and gratuitous insurance benefits in this case.

The Board made a most careful study of the entire record before reaching a determination. When a question arises as to whether a claimant is to be regarded as the unremarried widow of the serviceman for the purpose of receiving gratuitous death benefits, the claimant is under the burden of establishing by clear and convincing evidence that she

has not remarried. In this connection, where a claimant is known to have lived subsequent to the veteran's death in a relationship apparently marital in nature, such inference must be rebutted by satisfactory evidence before she may be considered having proved her unremarried status. Since the evidence in its entirety did not rebut the inference of remarriage, your appeal was denied. The determination of the Board constitute final administrative denial of your insurance claim.

Further action on your claim by this Board is not indicated at this time.

Very truly yours,

(SGD) JAMES W. STARCIL
Chairman

A TRUE COPY -

Annex "B"

REPUBLIC OF THE PHILIPPINES)
MANILA) S.S.

AFFIDAVIT

THAT I, LEONARDA MAYOR VDA DE LEBAY, 39 years old, widow, Filipino, residing and whith postal address at Candelaria, Quezon, Philippines, after being duly sworn in accordance with law, hereby declare and state the following facts, to wit:

1. That I am the lawful widow of the late veteran, ANTONIO LEBAY;

2. That I have not remarried and have not lived with any man since the death of my late veteran husband named-above;

3. That I admit to have an illicit relation with one SERGIO DE CASTRO, during the period from 1955 to 1957;

4. That out of my love affair with SERGIO DE CASTRO, I had given birth to a child who was born out of wedlock;

5. That although I had given birth, I did not live nor stay with SERGIO DE CASTRO, allegedly as his wife;

6. That SERGIO DE CASTRO, is a married man, so I cannot live nor stay with him as his wife, and my love affair with him is a typical of social friendships and not marriages, the fact that it was an incidental nature of my being the illicit-woman of SERGIO DE CASTRO;

7. That in the community where I am residing, I am regarded as the unremarried widow of the late veteran, Antonio Lubey, and my name is never linked with SERGIO DE CASTRO nor with any man to any government records, churches, and to any social gatherings except, the name of my late veteran husband, Antonio Lubey;

8. That during the period of my love affair with SERGIO DE CASTRO, (1955-1957) he did not contribute to the support of my dependents nor to my support;

9. That since I severed my illicit relation with SERGIO DE CASTRO in 1957, I do not have any illicit relation with any-man nor held myself out openly to the public to be the wife of such man up to the present date; and

10. That I hereby certify under oath that the above statements are true and correct.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of May, 1964, in the City of Manila, Philippines.

/s/ Leonarda Mayor Vda de Lubey
LEONARDA MAYOR VDA DE LUBAY
(Affiant)

SUBSCRIBED AND SWORN to before me this 8th day of May, 1964, in the City of Manila, Philippines. Affiant exhibited to me her Res. Cert. No. A-0546021, issued at Manila, on March 31, 1964.

/s/ Galeazzo F. Bucaycay
GALEAZZO F. BUCAYCAY
Notary Public
Until December 31, 1964

Doc. No. 189 :

Page No. 40 :

Book No. 1 :

Series of 1964.

EXEMP FROM DOC. STAMP - UNDER R. A. NO. 136.

[COMPLAINT]

Annex "C"

REPUBLIC OF THE PHILIPPINES)
M A N I L A) S.S.

JOINT-AFFIDAVIT

WE, ISIDORO LEBAY, Filipino, 41 years old, married, residing and with postal address at Candelaria, Quezon; BENITO LEBAY, Filipino, 41 years old, married, residing and with postal address at Candelaria, Quezon; FRANCISCO LEBAY, Filipino, 38 years old, married, residing and with postal address at Candelaria, Quezon; MARCIANO LEBAY, Filipino, 36 years old, married, residing and with postal address at Candelaria, Quezon; AQUILINO LEBAY, Filipino, 34 years old, single, residing and with postal address at Candelaria, Quezon; PEDRO BALITA, Filipino, 59 years old, married, residing and with postal address at Candelaria, Quezon; ALEJANDRO V. ARACION, Filipino, 59 years old, married, residing and with postal address at Candelaria, Quezon; and CONSOLACION MAYOR, Filipino, 34 years old, married, residing and with postal address at Candelaria, Quezon, after having been duly sworn in accordance with law, hereby declare and state the following facts, to wit:

1. That we know personally Mrs. LEONARDA MAYOR VDA DE LEBAY, widow of the late veteran, ANTONIO LEBAY:

2. That Mrs. LEONARDA MAYOR VDA DE LEBAY, has not remarried and has not lived with any man since the death of the late veteran, ANTONIO LEBAY:

3. That we know of the fact that Mrs. LEONARDA MAYOR VDA DE LUBAY, had an illicit relation with Sergio de Castro, during the period from 1955 to 1957 or two (2) years and as a result of her love affair with Sergio de Castro, she had given birth;

4. That although Mrs. LEONARDA MAYOR VDA DE LUBAY was disgraced and had given birth, she did not live nor stay with Sergio de Castro as his wife;

5. That we know that the relationship of Mrs. LEONARDA MAYOR VDA DE LUBAY with Sergio de Castro, was in strict secrecy because we did never see Sergio de Castro living with Mrs. Leonarda Mayor Vda de Lubay;

6. That Mrs. Leonarda Mayor Vda de Lubay's name was never linked with any man nor to Sergio de Castro, to any governmental records, churches, and/or to social gatherings except, the name of the late veteran husband, Antonio Lubay;

7. That she is regarded in the community as a widow of a World War II veteran;

8. That she introduced herself as widow to any social gatherings she attended;

9. That we can vouch to the fact that Mrs. LEONARDA MAYOR VDA DE LUBAY, has not remarried and has not lived with Sergio de Castro nor to any man since the death of the late veteran husband, ANTONIO LUBAY;

10. That we have full and personal knowledge of the aforementioned facts because the widow is our neighbor in the vicinity and the fact that the first five (5) affiants are the in-laws of the widow or Mrs. Leonarda Mayor Vda de Lubay being the brothers of the late ANTONIO LUBAY, and for this reason, we will be the first persons who will denounce our sister-in-law, Mrs. LEONARDA MAYOR VDA DE LUBAY if we know that she is having openly to the public to be the wife of Sergio de Castro nor to any man;

11. That we are willing to appear and testify before any Court, Board, Commission, and/or to any agency of the law regarding the truth of the above statements; and

12. That we hereby certify under oath that the above statements are true and correct to the best of our personal knowledge and belief.

IN WITNESS WHEREOF, we have hereunto set our hands this 16th day of April, 1964, in the City of Manila, Philippines.

/s/ Isidoro Lubay
ISIDORO LUBAY
Res. Cert. No. A-3353049
issued at Candelaria, Quezon
on January 9, 1964

/s/ Benito Lubay
BENITO LUBAY
Res. Cert. No. A-3354218
issued at Candelaria, Quezon
on January 20, 1964

/s/ Francisco Lubay
FRANCISCO LUBAY
Res. Cert. No. A-3353662
issued at Candelaria, Quezon
on January 9, 1964

/s/ Marciano Lubay
MARCIANO LUBAY
Res. Cert. No. A-3353657
issued at Candelaria, Quezon
on January 9, 1964

/s/ Aquilino Lubay
AQUILINO LUBAY
Res. Cert. No. A-3354103
issued at Candelaria, Quezon
on January 12, 1964

/s/ Pedro Balita
PEDRO BALITA
Res. Cert. No. A-3354081
issued at Candelaria, Quezon
on January 11, 1964

/s/ Alejandro Anacion
ALEJANDRO ANACION
Res. Cert. No. A-3356738
issued at Candelaria, Quezon
on March 20, 1964

/s/ Consolacion Mayor
CONSOLACION MAYOR
Res. Cert. No. A-3355516
issued at Candelaria, Quezon
on February 13, 1964

SUBSCRIBED AND SWORN to before me this 16th day of April, 1964, in the City of Manila, Philippines. Affiants exhibited to me their residence certificates whose numbers, place issued, and date issued, were indicated below their respective names.

/s/ Galeazzo F. Bucaycay
GALEAZZO F. BUCAYCAY
Notary Public
Until December 31, 1964

Doc. No.____; Page No.____;

Book No.____; Series of 1964.

EXEMPT FROM DOC. STAMP
UNDER R. A. NO. 136
FOR CLAIMS PURPOSES

ANSWER

[Filed June 24, 1965]

[Caption, signatures and certificate of service omitted]

A N S W E R

Comes now the defendant, the United States of America, by its undersigned counsel, and for answer to the complaint filed herein says:

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The complaint fails to state the grounds upon which the Court's jurisdiction depends, as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure.

THIRD DEFENSE

The Court lacks jurisdiction to issue declaratory or mandatory relief against the United States, as sought in the complaint.

FOURTH DEFENSE

The Court lacks jurisdiction to hear and determine this cause, for the reason that the complaint was not filed within six years after the right accrued for which the claim is made, as required by 38 U.S.C. 784(b).

FIFTH DEFENSE

To the extent that plaintiff seeks death compensation benefits, the Court entirely lacks jurisdiction, since all decisions of the Administrator concerning claims for such benefits have been made final and

conclusive by virtue of 38 U.S.C. 211(a), which statute deprives this Court of power or jurisdiction to review any such determination; and also because the United States has not waived its sovereign immunity to a suit of this nature.

SIXTH DEFENSE

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 1 of the complaint.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3, except to assert that plaintiff's husband died on June 13, 1942, while a prisoner of war in the Philippines, and that plaintiff first filed her claim for gratuitous insurance benefits on September 21, 1945.

4. Defendant admits the allegations of paragraph 4, except to assert that plaintiff was paid gratuitous insurance benefits through February 12, 1957 (date of last payment being January 13, 1957), and that she was paid death compensation benefits until December 31, 1956.

5. Defendant admits the allegations of paragraph 5, and further answering says that the Board of Veterans Appeals finally denied plaintiff's administrative appeal on January 12, 1960.

6. Defendant admits the allegations of paragraph 6.

7. Defendant denies the allegations of paragraph 7.

8. Defendant is not required to plead to the allegations of paragraph 8, but if defendant be deemed to be required to so plead, it denies the same.

9. Defendant denies the allegations of paragraph 9, except that defendant admits that it refuses to restore plaintiff's benefits.

10. Defendant admits the allegations of paragraph 10, except to say that the unpaid gratuitous insurance benefits would in no event amount to $5,000.00.

11. Defendant admits the allegations of paragraph 11, and further answering says that this action also does not constitute an "adequate remedy for the recovery of the amount of relief described" in the complaint.

WHEREFORE, having fully answered, defendant prays:

1. That plaintiff take nothing by this action and that the complaint be dismissed.

2. That defendant have its costs and such other and further relief as to the Court may seem proper.

ORDER JOINING ADDITIONAL DEFENDANT

[Filed July 16, 1965]

[Caption omitted]

ORDER JOINING ADDITIONAL DEFENDANT

It appearing that plaintiff's son, Rodante Lubay, who is now an adult and who has been paid insurance benefits claimed by plaintiff, should be joined as an additional defendant herein so there can be a full adjudication of the controversy, and it further appearing that both parties consent to such joinder, it is hereby

ORDERED that the said RODANTE LUBAY, whose address is Poblacion, Candelaria, Quezon, Philippines, be and the same hereby is made an additional party defendant to this action, in accordance with the provisions of 38 U.S.C. 784(a); and it is

FURTHER ORDERED that there be served upon said additional party defendant, at his said address by registered airmail with return receipt requested, copies of the following: (1) the complaint herein; (2) the answer herein; (3) this executed order; and (4) a summons requiring him to appear in this Court and file his pleading herein setting forth his claim, if any he has, within thirty (30) days after service of such summons; and Sherlyn A. Shoffner, 1835 Good Hope Road, S.E., Apt. #302, Washington, D. C., is hereby specially appointed by this Court, pursuant to Rule 4(c) of the Federal Rules of Civil Procedure, for the purpose of accomplishing such service;

and service shall be deemed complete upon mailing, pursuant to Rule 5(b) of the Federal Rules of Civil Procedure.

Done this 16th day of July, 1965.

/s/ Spottswood W. Robinson, III
United States District Judge

We consent:

/s/ Robert L. Pillote
ROBERT L. PILLOTE
Attorney for Plaintiff

/s/ David V. Seaman
DAVID V. SEAMAN, Attorney
Department of Justice
Attorney for Defendant
United States of America

APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

[Filed March 16, 1966]

[Caption, signatures and certificate of service omitted]

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now defendant United States of America, by its undersigned counsel, and moves the Court to enter judgment on the pleadings in its favor herein on the following grounds:

1. The complaint fails to state a claim upon which relief can be granted.

2. The complaint fails to state the grounds upon which the Court's jurisdiction depends.

3. The Court lacks jurisdiction to issue declaratory or mandatory relief against the United States, as sought in the complaint.

4. The Court lacks jurisdiction to hear and determine this cause, for the reason that the complaint was not filed within six years after the right accrued for which the claim is made, as required by 38 U.S.C. 784(b).

5. To the extent that plaintiff seeks death compensation benefits, the Court entirely lacks jurisdiction, since all decisions of the Administrator concerning claims for such benefits have been made final and conclusive by virtue of 38 U.S.C. 211(a), and because the United States has not waived its sovereign immunity to a suit of this nature.

6. The Court lacks jurisdiction over the subject matter of this action.

In the alternative, defendant moves for summary judgment and attached in support thereof is the Statement required by the local rules. A memorandum of points and authorities is also attached.

STATEMENT SUPPORTING APPELLANT'S MOTION

[Filed March 16, 1966]

[Caption, signatures and verification omitted]

DEFENDANT'S STATEMENT

Pursuant to Local Rule 9(h), defendant submits the following statement of the material facts as to which it contends there is no genuine issue in this case:

1. Plaintiff's husband, Antonio M. Lubay, a member of the Armed Forces of the United States, died in the Philippines on June 13, 1942, while covered by $5,000.00 of gratuitous National Service Life Insurance.

2. Plaintiff first filed a claim with the Veterans Administration for insurance benefits on September 21, 1945. She also filed claim for death compensation.

3. Plaintiff was awarded gratuitous insurance benefits and received payments under such award (payable at the rate of $17.00 monthly in a refund life income with 295 installments certain) through February 12, 1957 (176 installments), for a total of $2,992.00.

4. Payments were then suspended by the Veterans Administration, pending investigation of plaintiff's marital status. It was subsequently determined that she could no longer be recognized as insured's unremarried widow, and she was so advised on June 4, 1957. Her awards of insurance and death compensation were terminated.

5. Plaintiff filed a formal appeal from the denial of her awards. On January 12, 1960, the Board of Veterans Appeals issued a decision, a copy of which is attached as Exhibit "A", denying her appeal. She was formally notified of such decision by registered letter dated and mailed on January 12, 1960, a copy of which is attached as Exhibit "B". Plaintiff actually received

that letter, as evidenced by her reply thereto dated February 23, 1960, a copy of which is attached as Exhibit "C".

6. The Veterans Administration replied by letter dated March 16, 1960, a copy of which is attached as Exhibit "D".

7. Plaintiff wrote the Veterans Administration a letter dated October 4, 1961, a copy of which is attached as Exhibit "E". The Veterans Administration sent her a reply dated October 31, 1961, a copy of which is attached as Exhibit "F".

8. Plaintiff wrote the Veterans Administration a letter dated April 30, 1962, a copy of which is attached as Exhibit "G". The Veterans Administration replied by letter dated June 8, 1962, a copy of which is attached as Exhibit "H". No further communications were received from plaintiff.

9. In the meantime, the Philippine Bank of Commerce was legally qualified as guardian of the estate of insured's child, Rodante Lubey, and the remaining unpaid installments of insurance were authorized to be paid to him. Such payments were made during the period from February 13, 1957, through November 12, 1964 (93 installments), for a total payment of $1,581.00, but these were suspended upon institution of the present suit.

10. The present suit was filed on September 11, 1964. Rodante Lubay was joined as an additional party defendant by order dated July 16, 1965. He has not appeared in the action, although duly served with process. His default was noted by the Clerk on October 6, 1965, pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "A"

VETERANS ADMINISTRATION

BOARD OF VETERANS APPEALS

COPY OF DECISION NOT TO BE RELEASED TO APPELLANT 38 USC 3301

Leonarda Mayor Vda. de Lubay
Candelaria, Quezon
Philippines

JAN 12, 1960

LUBAY, Antonio
CLAIM NO. XC 6 327 794
DOCKET NO. 494 934

Title 38, U.S.C. : WW II DC (Leg.Rel.) Denied
Title 38, U.S.C. : NSLI Grat., (Leg.Rel.) Denied

Appellant represented by: American Red Cross

QUESTION AT ISSUE:

Recognition of the appellant, Leonarda Mayor Vda. de Lubay, as unremarried widow of veteran for death compensation and gratuitous insurance purposes.

OUTLINE OF MATERIAL EVIDENCE: The veteran died in June 1942. The appellant was awarded death compensation and gratuitous National Service Life Insurance as his unremarried widow, payments having been subsequently suspended.

On a field investigation approved in March 1957, depositions were obtained from a number of persons to the effect that the appellant and Sergio Castro had been living as husband and wife since about July 1954; that they had been regarded as a married couple in the community in which they lived; that a child, Fe Castro, was born to them in about July 1955; and that the appellant was visibly pregnant at the time of the field investigation. No record was found in the local community of a ceremonial marriage involving the appellant subsequent to the veteran's death.

The appellant has submitted a transcript of a certificate of marriage, which shows that a Sergio De Castro was married to Dionisia Torres (age 14 years) in February 1948. She has also submitted affidavits of others to the effect that she had not remarried nor had she lived with any man as her common-law husband since the veteran's death in June 1942.

DISCUSSION AND DECISION: Under applicable criteria, where a veteran's widow is shown to have been living in a relationship ostensibly marital in nature, thereby creating an inference of remarriage, she does not qualify for recognition as his unremarried widow for death compensation or gratuitous insurance purposes, in the absence of satisfactory evidence that she has not remarried. An inference of the appellant's remarriage has been created by her ostensibly marital cohabitation with Sergio Castro since July 1954 and the evidence viewed in its entirety is considered inadequate to rebut such inference. Thus, the Board finds that the appellant may not be recognized as the veteran's unremarried widow for death compensation or gratuitous insurance purposes. The appeal is denied and this decision constitutes final administrative denial of the appellant's insurance claim.

/s/ William C. Cole
WILLIAM C. COLE
Associate Member

/s/ P. Moncure
P. MONCURE
Associate Member

/s/ W. H. Morell
W. H. MORELL
Associate Member

COPY OF DECISION NOT TO BE RELEASED TO APPELLANT
38 USC 3301

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "B"

REGISTERED MAIL

01kA1

Mrs. Leonarda Mayor Vda. de Lubay
Candelaria, Quezon
Philippines

XC 6 327 794
LUBAY, Antonio

Dear Mrs. Lubay:

The Board of Veterans Appeals has completed action on your appeal for death compensation and gratuitous insurance benefits in this case. We are also informing your representative, the American Red Cross, of the determination reached.

The Board carefully reviewed all evidence of record, including your statements on appeal, a transcript of a certificate of marriage of Sergio De Castro and Dionisia Torres in February 1948, and affidavits submitted in support of your claim.

Under applicable regulations, where a veteran's widow is shown to have been living in a relationship ostensibly marital in nature, thereby creating an inference of remarriage, she does not qualify for recognition as his unremarried widow for death compensation or gratuitous insurance purposes in the absence of satisfactory evidence that she has not remarried. An inference of your remarriage has been created by your having lived with another man since July 1954. The evidence viewed in its entirety is not adequate to rebut such inference. Thus, the Board found that you may not be recognized as the veteran's unremarried widow for death compensation or gratuitous insurance purposes. Therefore, the appeal was denied and this decision constitutes final administrative denial of your insurance claim.

Very truly yours,

Copy of decision NOT furnished
appellant

JAMES W. STANCIL
Chairman

2 CC - ARC, Wash., D. C.

JAN 12, 1960

REGISTRY NO 270706 REGISTRY CLERK _____

ELPOSSUM:bbg

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "C"

DISPATCHED
MAR 17, 1960

Candelaria, Quezon
Philippines
February 23, 1960

The Chairman
Board of Veteran's Appeals
Veterans Administration
Washington 25, D. C. U.

XC- 6 327 794
LUBAY, Antonio

Dear Sir:

Comes now the undersigned petitioner, and to the Honorable Board of Veterans Appeals, Veterans Administration, most respectfully submits the following salient points for reconsideration of the decision dated January 12, 1960:

That the decision rendered is that I may no longer be recognized as the unremarried widow of the above-named deceased veteran for compensation purposes on the basis that I have been living with another man since July 1954;

That as per your decision, I in order to rebut the said decision have submitted to the Board certificate of marriage of Sergio de Castro and Dionicia Torres in February 1948, thereby creating the validity of the allegation that said Sergio de Castro is still legally married, and could never under any valid circumstances contact or enter into another marriage, while their marriage are still in effect;

That also I have never entered into any marriage with any other man, and in the absence of records which must be public records of my remarriage, I am therefore under the law, still remains a widow and therefore unremarried. In the statement that the man allegedly my common-law husband, and myself have been living publicly in the relationship ostensibly marital in nature, I have the honor still to deny this matters, because in the community wherein I still resides, I am still known to be unremarried, and my dignity and honor is still being uplifted and honored in this place. In matters of any other evidences that may be executed in the form of statement from some persons, I hereby request that your goodness please examine these witnesses to see if they are qualified, witnesses and that they are unbiased and that said witnesses may be lying or under anger.

[STATEMENT SUPPORTING APPELLANT'S MOTION]

That under the fact that I am still unremarried I am therefore requesting that your good office be cognizant in fact that I am still unremarried and that due allowances may still be given. In the absence of any best evidence purporting to show my marriage with any other man, justice demands that doubts if any may be disolve in my favor.

Therefore, I pray to your Honorable Board of Veterans Appeals for due reconsideration of your decision. Hoping for your reply and action, I am.

Very respectfully yours,

/s/ Leonarda Mayor Vda de Lubay
LEONARDA MAYOR VDA DE LUBAY
Widow

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "D"

Mar 16, 1960

01&A1

Mrs. Leonarda Mayor Vda. de Lubay
Candelaria, Quezon
Philippines

XC 6 327 79&
LUBAY, Antonio M.

Dear Mrs. Lubay:

We have your letter of February 23, concerning the action taken by the Board of Veterans Appeals on your appeal for death compensation and gratuitous insurance benefits in this case.

The Board made a most careful study of the entire record before reaching a determination. When a question arises as to whether a claimant is to be regarded as the unremarried widow of the serviceman for the purpose of receiving gratuitous death benefits, the claimant is under the burden of establishing by clear and convincing evidence that she has not remarried. In this connection, where a claimant is shown to have lived subsequent to the veteran's death in a relationship apparently marital in nature, such inference must be rebutted by satisfactory evidence before she may be considered having proved her unremarried status. Since the evidence in its entirety did not rebut the inference of remarriage, your appeal was denied. The determination of the Board constituted final administrative denial of your insurance claim.

Further action on your claim by this Board is not indicated at this time.

Very truly yours,

JAMES W. STANCIL
Chairman

DISPATCHED
MAR 17, 1960
BOARD OF VETERANS APPEALS

THRU: Mgr., VARO, Manila, Philippines

THRU: Foreign Affairs Division

EWOLSON:dbw

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "E"

---

15 Martinez Street
Candelaria, Quezon
Philippines

October 4, 1961

LUBAY, Antonio M.
XC 6 327 794

Manager
VA Benefits Office
Munitions Building
Washington 25, D. C.
U. S. A.

Attention: Adjudication Officer

Dear Sir:

This letter is to request for a reconsideration of my case.

My death compensation as the unremarried widow of the veteran has been suspended since December, 1956 due to an unfounded report and allegation of my remarriage. It was alleged that I had illicit relationship with a certain SERGIO DE CASTRO. This is not possible for the reason that Mr. Sergio de Castro is a very much married man, and he and his legal wife DIONISIA TORRES, have had 6 children out of their married life up to this time. They have a distinct and separate conjugal dwelling of their own where they have raised their 6 children.

I have enclosed the certified copy of the public record of marriage of Mr. Sergio de Castro, an Affidavit of Mrs. Dionisia Torres Castro (his wife) and a joint affidavit of Mrs. Prima Penaloza and Mr. Teofilo Sarmiento. Please take pity on my case, in fairness and equity to me who has been unjustly accused of a falsehood. Also please review carefully the affidavits submitted herewith and you will come to the conclusion that I am still entitled to the resumption of my death compensation and insurance benefits.

I am therefore requesting a review of my case at the earliest possible time, and that I sincerely hope - your good office will be kind and sympathetic enough to apply to my case the truest sense of American justice.

Very truly yours,

/s/ Leonarda Mayor Vda de Lubay
(Mrs.) LEONARDA MAYOR VDA DE LUBAY

Encls.: As stated.

[STATEMENT SUPPORTING APPELLANT'S MOTION]

Republic of the Philippines
Department of Health
OFFICE OF THE LOCAL CIVIL REGISTRAR
City of San Pablo

TO WHOM IT MAY CONCERN :

I HEREBY CERTIFY that according to the Register of Marriages, Book No. 7 Page 79 , Series of 1948 , existing under my custody in this office the following inscriptions are recorded and exactly copied :

Date of Registration			Feb. 17, 1948
Register Number			86
Names of the Contracting Parties	HUSBAND SERGIO DE CASTRO	.....	WIFE DIONISIA TORRES
Age	19	.....	14
Nationality	Filipino	.....	Filipino
Single, Widowed or Divorced	Single	.....	Single
Residence	City of San Pablo	.....	City of San Pablo
Name of Father	Lazaro de Castro	.....	Bernardo Torres
Nationality	Filipino	.....	Filipino
Name of Mother	Francisca Banayo	.....	Eleuteria Alcancia
Nationality	Filipino	.....	Filipino
Place of Marriage	Municipal Court		
Date of Marriage	Feb. 17, 1948		
Witnesses	Dr. Alvaro B. Avanzado		Priscila G.deAvanzado
Residence	City of San Pablo	.....	City of San Pablo
Person Giving the Consent or Advice			
Name	Lazaro de Castro	.....	Eleuteria Alcancia
Residence	City of San Pablo	.....	City of San Pablo
Relation To The Minor Contracting Party	Father	.....	Mother
Solemnized By	Solon F. Cordero		
Title	Actg.Mun. Judge (Aux.)		
Address	Alaminos, Laguna		
Date of Receipt of Marriage Certificate			Feb. 17, 1948

- -

Issued upon verbal request of Mr. Lazaro de Castre this 22nd day of September , 1961, City of San Pablo.

PETRONILO L. TORRES
City Health Officer
Local Civil Registrar
FOR AND IN THE ABSENCE OF THE
LOCAL CIVIL REGISTRAR

Note: Paid- ₱1.00
O.R.No. G-3367196
Dated- Sept. 22, 1961
City of San Pablo

/s/ Maximino A. Baldovino
MAXIMINO A. BALDOVINO
Chief Clerk
Asst. Local Civil Registrar

DOCUMENTARY STAMP

[STATEMENT SUPPORTING APPELLANT'S MOTION]

REPUBLIC OF THE PHILIPPINES)
CITY OF SAN PABLO) s.s.

A F F I D A V I T

I, DIONISIA TORRES, of legal age, Filipino citizen, with residence and postal address at Bo. San Francisco, City of San Pablo, Philippines, after having been duly sworn to in accordance with law, depose and say:

1. That I am the wife of SERGIO DE CASTRO with I have been and is presently living and residing under the same roof and residence at Bo. San Francisco, City of San Pablo, Philippines;

2. That I and my said husband, SERGIO DE CASTRO were lawfully married on February 17, 1948 at the City of San Pablo our marriage having been duly solemnized by and before the Municipal Judge of said City;

3. That out of our conjugal union, six children were born, namely, ELSIE, DENIA, EVELYN, ELENA, AIDA and SUSAN, all surnamed DE CASTRO who are all under our care, custody and maintenance in our aforesaid residence; and

4. That I executed this sworn statement for purposes of establishing the fact that I am the true and lawful wife and no other, of said SERGIO DE CASTRO.

IN WITNESS WHEREOF, I signed this affidavit this 25th day of September, 1961, at the City of San Pablo, Philippines.

/s/ Dionisia Torres
DIONISIA TORRES
Res. Cert. No. A-4811809 issued
April 5, 1961 at San Pablo City.

SUBSCRIBED AND SWORN to before me this 25th day of September, 1961, affiant exhibiting her Res. Cert. as indicated below her name and signature above.

/s/ Antonio M. Moncada
ANTONIO M. MONCADA
Notary Public
Until December 31, 1961

Doc. No. 169 page 54
Book XVIII, S'61.
DOCUMENTARY STAMP

[STATEMENT SUPPORTING APPELLANT'S MOTION]

REPUBLIC OF THE PHILIPPINES)
CITY OF SAN PABLO) s.s.

JOINT AFFIDAVIT

We, PRIMA PENALOZA, and TEOFILO SARMIENTO, both of legal age, both married, Filipino citizens, with residence and postal addresses at Bo. San Francisco, City of San Pablo, Philippines, after having been duly sworn to in accordance with law, depose say:

1. That we know personally the spouses SERGIO DE CASTRO and DIONISIA TORRES, they being our barriomates at San Francisco, City of San Pablo, Philippines;

2. That we know of our own personal knowledge that the said spouses, SERGIO DE CASTRO and DIONISIA TORRES have been and are living together as husband and wife since the time they were married sometime in February 1948, their home and residence being at our said barrio of San Francisco, City of San Pablo; we know also that they have never been separated from each other, up to the present;

3. Thattwe are able to attest to the above facts because as barriomates, we use to see them in their home in the company of their six children.

IN WITNESS WHEREOF, we signed this affidavit this 2nd day of October, 1961, at the City of San Pablo, Philippines.

/s/ Prima Penaloza
PRIMA PENALOZA

/s/ Teofilo Sarmiento
TEOFILO SARMIENTO

SUBSCRIBED AND SWORN to before me this 2nd day of October, 1961, at the City of San Pablo, Philippines. Affiant Prima Penaloza exhibited her Res. Cert. No. A-4817024 issued Aug. 2, 1961 at San Pablo City, and affiant Teofilo Sarmiento exhibiting his Res. Cert. No. A-4672214 issued July 25, 1960 also at San Pablo City.

Doc. No. 177 page 56
Book XVIII, S'61.
DOCUMENTARY STAMP

/s/ Antonio M. Moncada
ANTONIO M. MONCADA
Notary Public
Until December 31, 1962

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "F"

OCT 31 1961

Mrs. Leonarda Mayor Vda. de Lubey
15 Martinez Street
Candelaria, Quezon
Philippines

XC 6 327 794
LUBAY, Antonio M
3072/216 B

Dear Mrs. Lubey:

Your letter of October 4, 1961 has been carefully considered, together with the marriage record of Sergio De Castro and Dionisia Torres, which was already of record, and no change is warranted in the prior action taken by this office.

Very truly yours,

A. VALOKE
Adjudication Officer

MDC:vab/155 B

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "G"

---

15 Martinez Street
Candelaria, Quezon
Philippines

April 30, 1962

XC 6 327 794
LUBAY, Antonio M.

Manager
Veterans Benefits Office
Veterans Administration
Munitions Building
Washington 25, D.C.
U. S. A.

Attn: Adjudication Officer

Dear Sir:

I am referring to your letter of October 31, 1961 informing me that no change is warranted in the prior action taken by your office in spite of a proof of marriage of Sergio de Castro and Dionisia Torres. While it may be true that I have had an illicit relationship with Sergio de Castro for sometime, that was from 1956 to 1957, I was never regarded by him as his wife. In support of my contention, here is an Accident Policy Insurance of Sergio de Castro indicating his wife, Dionisia Torres de Castro, as his beneficiary.

Request that my claims be further considered on the basis of the attached evidence.

Very truly yours,

/s/ Leonarda Mayor Vda. de Lubay
LEONARDA MAYOR VDA. DE LUBAY

[STATEMENT SUPPORTING APPELLANT'S MOTION]

EXHIBIT "H"

JUN 8 1962

Mrs. Leonarda Mayor Vda de Lubey
15 Martinez Street
Candelaria, Quezon
Philippines

XC 6 327 794
LUBAY, Antonio M.
3072-216B

Dear Mrs. Lubey:

Your letter of April 30, 1962, has been carefully considered together with the Personal Accident Policy of Sergio de Castro.

No change is warranted in the prior action taken by the Board of Veterans Appeals.

Very truly yours,

A. VALDES
Adjudication Officer

cc: American Red Cross
1027 Munitions Building
Washington 25, D.C.

JFL/sj 1180b

TEXT MANAGER MANILA PHILIPPINES

APPELLEE'S OPPOSITION AND CROSS MOTION FOR SUMMARY JUDGMENT

[Filed March 25, 1966]

[Caption, signatures, points and authorities, and certificate of mailing omitted]

OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

AND

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Leonarda M. vda de Lubey, by her undersigned Court appointed counsel, and says in opposition to defendants' motion that:

1. This action is not barred by the Statute of Limitations as alleged in defendants' Motion.

2. The complaint, if deficient in stating a cause of action or in setting forth the jurisdiction of the Court, can be corrected by amendment.

Plaintiff in support of her own Motion states as follows:

1. That there is no genuine issue as to any material fact.

2. That the doctrine of continuing negotiations has tolled the statute of limitations and, therefore, plaintiff's suit is not time barred.

3. Plaintiff is the unremarried widow of the deceased serviceman, Antonio M. Lubey.

For the reasons stated above defendants' Motion For Judgment on the Pleadings or in the alternative For Summary Judgment, should be denied and plaintiff's Motion For Summary Judgment should be granted.

STATEMENT SUPPORTING APPELLEE'S OPPOSITION AND CROSS MOTION

[Filed March 25, 1966]

[Caption and signatures omitted]

PLAINTIFF'S STATEMENT

Pursuant to Local Rule 9(h), plaintiff submits the following statement of the material facts as to which she contends there is no genuine issue in this case;

Plaintiff adopts as her own the Statement of Facts as set forth in Defendants' Motion, ¶1 through ¶10 in its entirety, as though specifically reproduced herein.

APPELLANT'S OPPOSITION TO APPELLEE'S CROSS MOTION

[Filed April 5, 1966]

[Caption, signatures and certificate of service omitted]

OPPOSITION OF DEFENDANT UNITED STATES OF AMERICA TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the defendant United States of America, by its undersigned counsel, and says in opposition to plaintiff's motion for summary judgment:

1. The complaint fails to state a claim upon which relief can be granted.

2. The complaint fails to state the grounds upon which the Court's jurisdiction depends.

3. The Court lacks jurisdiction to issue declaratory or mandatory relief against the United States, as sought in the complaint.

4. The Court lacks jurisdiction to hear and determine this cause, for the reason that the complaint was not filed within six years after the right accrued for which the claim is made, as required by 38 U.S.C. 784(b).

5. To the extent that plaintiff seeks death compensation benefits, the Court entirely lacks jurisdiction, since all decisions of the Administrator concerning claims for such benefits have been made final and conclusive by virtue of 38 U.S.C. 211(a), and because the United States has not waived its sovereign immunity to a suit of this nature.

6. The Court lacks jurisdiction over the subject matter of this action.

7. To the extent that insurance benefits have already been paid to defendant Rodante Lubay (insured's son), plaintiff is estopped to make claim therefor at this time, and the defendant United States of America should be allowed an appropriate credit.

[APPELLANT'S OPPOSITION TO APPELLEE'S CROSS MOTION]

In the event the Court rules in favor of plaintiff, the defendant United States of America hereby moves for summary judgment in its favor against defendant Rodante Lubey, cutting off all rights he may have to the gratuitous benefits involved herein. Rodante Lubey failed to appear in this action although duly summoned, and his default was noted herein by the Clerk as of October 6, 1965.

Attached is the Statement required by the local rules, together with supporting memorandum of points and authorities.

STATEMENT SUPPORTING APPELLANT'S OPPOSITION

[Filed April 5, 1966]

[Caption and signatures omitted]

STATEMENT

Pursuant to Local Rule 9(h), defendant United States of America hereby reiterates the contents of the Statement in support of its pending motion herein for judgment on the pleadings or summary judgment. Plaintiff has agreed to the accuracy of that Statement.

Further, defendant states that the United States Court of Appeals for the District of Columbia Circuit, by a "judgment" issued on January 6, 1965 (a copy of which is attached as Exhibit "A"), ruled in favor of the Government in consolidated appeals in Mouge v. United States, C.A. 18,359 (Civ. No. 709-63), and Reynoso v. United States, C.A. 18,360 (Civ. No. 1015-63). By subsequent order issued on May 10, 1965 (a copy of which is attached as Exhibit "B"), that Court amended said judgment by deleting a citation to Soriano v. United States, 352 U. S. 270 (1957), and in lieu thereof inserting the following:

> "The statute of limitations barred suit. See Samala v. United States, 183 F. Supp. 601 (D.D.C. 1960); Aguilar v. United States, 183 F. Supp. 598 (D.D.C. 1960)."

In Reynoso, one of the two cases involved in that consolidated appeal, the insured serviceman had died on July 20, 1943. His widow, the plaintiff, filed insurance claim with the Veterans Administration on March 11, 1946. This was granted, and plaintiff received benefits until her claim was finally denied on April 26, 1957 (on the ground that she could no longer be

considered as unremarried). She filed suit on April 19, 1963, less than six years after such denial. Thus, the validity of the limitations computation set forth in Samala v. United States was directly involved in the Monge-Reynoso appeals, and the Court of Appeals specifically approved Samala and impliedly overruled Tubongbanua v. United States, 223 F. Supp. 379 (D.C.D.C. 1963) (Holtzoff, J.).

These facts can be verified from the permanent jacket file in Reynoso v. United States, Civil Action Number 1015-63 in this Court.

[STATEMENT SUPPORTING APPELLANT'S OPPOSITION]

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,359

Delores C. Vda Da Mongo,
Appellant,

v.

United States of America,
Appellee.

SEPTEMBER TERM, 1964.

Civil 709-63

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JAN 6-1965

Nathan J. Paulson
Clerk

No. 18,360

Sra. Pelagia G. Vda DeReynoso,
Appellant,

v.

United States of America,
Appellee.

Civil 1015-63

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, Edgerton, Senior Circuit Judge, and Wright, Circuit Judge.

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

[STATEMENT SUPPORTING APPELLANT'S OPPOSITION]

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgments of the District Court on appeal in these cases are affirmed. See Soriano v. United States, 352 U.S. 270 (1957).

Per Curiam.

Dated: JAN 6 - 1965

[STATEMENT SUPPORTING APPELLANT'S OPPOSITION]

EXHIBIT "B"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,359

Delores C. vda de Monge,
Appellant,

v.
United States of America,
Appellee.

No. 18,360

Pelagia C. vda de Reynoso,
Appellant,

v.
United States of America,
Appellee.

SEPTEMBER TERM, 1964
C.A.No. 709-63
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED May 10, 1965

Nathan J. Paulson
Clerk
C.A.No. 1015-63

Before: Bazelon, Chief Judge, Edgerton, Senior Circuit Judge, and Wright, Circuit Judge, in Chambers.

ORDER

On consideration of appellants' motion for rehearing or, for clarification of judgment, it is

ORDERED by the court that appellants' motion for rehearing be denied, and it is

FURTHER ORDERED by the court that the judgment entered herein on January 6, 1965, be amended as follows:

Delete the citation to Soriano v. United States, 352 U.S. 270 (1957), appearing in the last line of the second paragraph of said judgment, and in lieu thereof insert the following:

[STATEMENT SUPPORTING APPELLANT'S OPPOSITION]

The statute of limitations barred suit. See Samala v. United States, 183 F.Supp. 601 (D.D.C. 1960); Aguilar v. United States, 183 F.Supp. 598 (D.D.C. 1960).

Per Curiam.

Dated: MAY 10 1965

OPINION OF THE COURT

[Rendered April 22, 1966, by Judge Holtzoff]

THE COURT: These are cross-motion for summary judgment in an action brought by the widow of a veteran for veteran's insurance known as National Service Life Insurance, as well as death compensation benefits.

The veteran died on June 13, 1942. The widow filed a claim within the permitted period. The claim was allowed. Later, in 1960, her rights were terminated by the Veterans Administration. She brought suit then to recover on her claim in 1964, within the period of the statute of limitations.

The government, however, seeks to add the time before the original claim was filed to the time that elapsed between the termination of the prior allowance of the claim and the filing of the suit, and by adding those two periods the government claims that the six-year period of limitations has expired.

The Court holds that this may not be done, and it has so held in the case of Tubongbanua v. United States, 223 F. Supp. 379. No appeal was taken by the government in that case. In that case this Court wrote as follows on this point:

> "Admittedly this suit was filed with reasonable promptness after the Veterans Administration discontinued payments that it had been making for a long period of time, and if the statute of limitations commenced to run on the date of the discontinuance, then concededly the action is not barred.

The government, however, takes the position that the period between April 6, 1942, when the death occurred, and June 20, 1947, when the claim was originally filed, should be taken into consideration as part of the period of limitations. The court disagrees. There was no reason for the plaintiff to bring any suit. In fact, there was no basis for any suit so long as the claim had been allowed and benefits were being paid. The right to bring suit arose when payments were discontinued and the claim was repudiated. There is an analogy in the general statute of limitations. The statute is tolled and the period begins again if a part payment on a claim is made." The Court sees no reason for not adhering to the ruling it heretofore has made.

This point apparently has never been passed upon by the Court of Appeals for this Circuit. To be sure, the government counsel referred to two cases in the Court of Appeals where there was an affirmance by order without an opinion. In such a case it is ordinarily impossible to determine on what particular point the Court predicated the result and, therefore, it cannot constitute a ruling on a question of law.

There is another aspect of this case which deserves mention. This is one of those cases in which the Veterans Administration erroneously recognized common law marriages in the Philippines, which are unknown to the law of the Philippines, as has been held by several Judges of this

Court and by the Court of Appeals for this Circuit, and yet the Veterans Administration seems to pursue the even tenor of its way.

The payments under this claim were terminated on the theory that the widow remarried. Under the law a remarriage of a widow terminates her rights. The alleged remarriage was a so-called common law marriage, which does not exist in the Philippines. In other words, the Veterans Administration by its own error has created this situation.

The defendant's cross-motion for summary judgment is denied and the plaintiff's cross-motion for summary judgment is granted.

However, the Court will also include a provision in the judgment terminating the rights of the son, who has been receiving payments in the meantime.

Mr. Seaman, the Court of course appreciates the position that you have to take as government counsel. You are in a rather difficult position, perhaps embarrassing position of having to defend an indefensible position. The Court appreciates your position as a member of the bar.

JUDGMENT

[Filed April 27, 1966]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARDA M. VDA DE LUBAY,

Plaintiff,

v.

UNITED STATES OF AMERICA,
RODANTE LUBAY,

Defendants.

Civil Action No. 2249-64

J U D G M E N T

This case having come on for hearing on April 22, 1966, upon motion of the defendant United States of America for judgment on the pleadings or in the alternative for summary judgment, and upon the cross motion of plaintiff for summary judgment, and upon the further cross motion of defendant United States of America for summary judgment in its favor against defaulting defendant Rodante Lubay contingent upon plaintiff's prevailing; and the Court having heard argument of counsel and being fully advised; and the Court's opinion having been made a part of the record herein; it is now

ORDERED that the motion of defendant United States of America for judgment on the pleadings or for summary judgment be is denied; and it is

FURTHER ORDERED that the cross motion of plaintiff for summary judgment be is granted; and it is

FURTHER ORDERED that the cross motion of defendant United States of America for summary judgment against defendant Rodante Lubay is also granted; and it is AH be

FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff, Leonarda M. Vda de Lubay, is found to be the unremarried widow of the deceased serviceman Antonio M. Lubay, and that she do have and recover of and from the defendant United States of America the remaining death benefits of the $5,000.00 gratuitous National Service Life Insurance herein sued upon, the same to be paid to her by the Veterans Administration in accordance with the terms of the applicable statutes and regulations, commencing as of February 13, 1957, the day following the effective date that payments to plaintiff were terminated; and it is

FURTHER ORDERED, ADJUDGED and DECREED that the defendant Rodante Lubay take nothing herein; and it is

FURTHER ORDERED that there be deducted by the Veterans Administration from all payments which may hereafter be made to plaintiff by virtue of and pursuant to this judgment an amount equal to ten percentum (10%) thereof and that the same be paid to Wallace, Lerch & Pillote, attorneys for plaintiff, whose address is Bowen Building, 815 Fifteenth Street, N. W., Washington, D. C., as reasonable attorneys' fees herein.

Done this 27th day of April, 1966.

/s/ Alexander Holtzoff
United States District Judge

No objection as to form:

/s/
ROBERT L. PILLOTE
Attorney for Plaintiff

/s/
DAVID V. SEAMAN, Attorney
Department of Justice
Attorney for Defendant
United States of America

NOTICE OF APPEAL

[Filed June 24, 1966]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LEONARDA M. Vda de LUBAY

Plaintiff.

vs. CIVIL NO. 2249-64

UNITED STATES OF AMERICA

Defendant.

Notice is hereby given this 24th day of June , 1966, that the United States of America, defendant

hereby appeals to the United States Court of Appeals for the District of Columbia from the ~~judgment~~ Order of this Court entered on the 27th day of April, 1966

in favor of plaintiff

against said defendant

/s/ DAVID G. BRESS
DAVID G. BRESS, United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney
Attorneys for United States, Defendant

Copy to:

Robert Pillote, Esquire
815 15th Street, N.W.
Washington, D.C. 20005

Attorney for Plaintiff

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,358

UNITED STATES OF AMERICA,

Appellant,

v.

LEONARDA M. VDA DE LUBAY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

JOHN W. DOUGLAS,
Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

MORTON HOLLANDER,
DAVID V. SEAMAN,
Attorneys, Civil Division,
Department of Justice,
Washington, D. C. 20530.

QUESTIONS PRESENTED

1. Whether limitations commenced running against appellee only upon administrative denial of her National Service Life Insurance claim (rather than from the date of insured's death), thus avoiding a jurisdictional bar to maintenance of this suit.

2. Whether the district court properly required appellant to make duplicate payment to appellee of insurance benefits already paid to insured's son.

INDEX

CITATIONS

Cases:

* Cases chiefly relied upon are marked by asterisks.

Statutes:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,358

UNITED STATES OF AMERICA,

Appellant,

v.

LEONARDA M. VDA DE LUBAY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia (J.A. 46), entered on April 27, 1966, granting appellee's motion for summary judgment in a suit to recover the gratuitous benefits provided by Section 602(d)(3)(B) of the National Service Life Insurance Act of 1940, 38 U.S.C. (1952 Ed.) 802(d)(3)(B). Notice of appeal was filed on June 24, 1966 (J.A. 49). The jurisdiction of the district court was invoked under 38 U.S.C. 784. Appellant contested that

jurisdiction on the ground that suit was not brought within the applicable six year limitations period, 38 U.S.C. 784(b). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This suit was brought to review a determination by the Board of Veterans Appeals (J.A. 20-22) that, because evidence justified the inference that she had remarried, appellee was no longer entitled to receive monthly payments of gratuitous insurance pursuant to Section 602(d)(3)(B) of the National Service Life Insurance Act of 1940.[1/] Such benefits are payable to a widow only so long as she remains unremarried.[2/]

Appellee's husband, Antonio M. Lubey, a member of the Armed Forces of the United States, died in the Philippines on June 13, 1942. Pursuant to said statute,[3/] he is deemed to have been covered at his death with $5,000 of gratuitous insurance. (J.A. 18).

1/ 38 U.S.C. (1952 Ed.) 802(d)(3)(B). Although the National Service Life Insurance Act, as such, was repealed in 1958 and provisions relating to gratuitous insurance have not been reenacted, they remain effective as to appellee because of a savings clause, 38 U.S.C. (1964 Ed.) 788, and appear in the 1952 Edition of the United States Code.

2/ Section 602(d)(2) and (5) of the National Service Life Insurance Act of 1940, 38 U.S.C. (1952 Ed.) 802(d)(2) and (5). See footnote 6, infra.

3/ Section 602(d)(3)(B) of the National Service Life Insurance Act of 1940, 38 U.S.C. (1952 Ed.) 802(d)(3)(B).

On September 21, 1945, or 3 years and 3 months after the serviceman's death, appellee as widow filed a claim for insurance with the Veterans Administration.[4] She was awarded the proceeds in a refund life income, thereafter receiving monthly payments of $17.00 retroactive from the date of insured's death. Payments were suspended in February 1957, and the Veterans Administration later advised appellee that her award was terminated because she could no longer be recognized as unremarried. (J.A. 18).

Appellee administratively appealed to the Board of Veterans Appeals,[5] which affirmed the termination on January 12, 1960 (J.A. 18, 20, 21). On the same day the Board also sent appellee a registered letter, which concluded (J.A. 18, 22):

> An inference of your remarriage has been created by your having lived with another man since July 1954. The evidence viewed in its entirety is not adequate to rebut such inference. Thus, the Board found that you may not be recognized as the veteran's unremarried widow for death compensation or gratuitous insurance purposes. Therefore, the appeal was denied and this decision constitutes final administrative denial of your insurance claim. [Emphasis supplied]

4/ Appellee also claimed death compensation, a separate gratuitous benefit now authorized by 38 U.S.C. 321. This was awarded and was later terminated on the same basis as the insurance (J.A. 18). This appeal does not involve compensation; appellee has not challenged the judgment, which only grants her insurance (J.A. 46-48).

5/ The Board of Veterans Appeals, an arm of the Veterans Administration, issues final decisions on appeals to the Administrator. Its jurisdiction is spelled out in 38 U.S.C. (1964 Ed.) 4004.

The Veterans Administration then awarded remaining insurance installments to insured's son, Rodante Lubay.[6] He received monthly benefits totalling $1,581.00, during the period from February 13, 1957, through November 12, 1964, when payments to him were suspended due to institution of this suit by appellee. (J.A. 19).[7]

On three occasions following denial of her claim, appellee sought to persuade the Veterans Administration to change its ruling. She first wrote a letter in February 1960, requesting reconsideration (J.A. 19, 23, 24), to which the Board responded in March 1960 (J.A. 19, 25):

> Since the evidence in its entirety did not rebut the inference of remarriage, your appeal was denied. The determination of the Board constituted final administrative denial of your insurance claim.
>
> Further action on your claim by this Board is not indicated at this time.

After a year and a half, appellee wrote again in October 1961, forwarding several documents (J.A. 19, 26-29). The Veterans Administration replied that same month, as follows (J.A. 19, 30):

> Your letter of October 4, 1961 has been carefully considered, together with the marriage record of Sergio De Castro and Dionisia Torres, which was already of record, and no change is warranted in the prior action taken by this office.

6/ Where insured leaves a widow, his child remains merely a secondary beneficiary under the statutory scheme, becoming entitled to payment only upon death or disqualification of the widow. 38 U.S.C. (1952 Ed.) 802(d)(2) and (5). If there is no widow or child eligible to take, insured's parents can qualify. For discussion and interpretation of these provisions, see Philippine National Bank v. United States, 112 U.S. App. D.C. 126, 300 F. 2d 715; United States v. Philippine National Bank, 110 U.S. App. D.C. 250, 292 F. 2d 743.

7/ If this suit is ultimately dismissed, the Veterans Administration will reinstate Rodante Lubay's insurance award as of November 13, 1964.

Six months later, appellee sent a final letter in April 1962 (J.A. 19, 31). The Veterans Administration responded in June 1962 (J.A. 19, 32):

> Your letter of April 30, 1962, has been carefully considered together with the Personal Accident Policy of Sergio de Castro.
>
> No change is warranted in the prior action taken by the Board of Veterans Appeals.

Appellee did not communicate further (J.A. 19). On September 11, 1964, or 4 years and 8 months after the January 12, 1960 "final administrative denial", she filed this suit in district court (J.A. 3-11, 19). Appellant answered, raising the defense of limitations (J.A. 12-14).[8] Appellant then obtained the joinder of Rodante Lubay as an additional defendant, to minimize possible double liability (J.A. 15, 16).[9]

In advance of trial, appellant moved for judgment on the pleadings or in the alternative for summary judgment, urging appellee's failure to commence suit within the statutory time period (J.A. 17). Appellee cross-moved for summary judgment (J.A. 33). The district court denied

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8/ In taking the position that the action was barred by the six year statute of limitations, 38 U.S.C. 784(b), the Government computed the period by adding the 3 year and 3 month period elapsing between June 13, 1942 (the date of the serviceman's death), and September 21, 1945 (the date of filing of the claim with V.A.), to the 4 year and 8 month period elapsing between January 12, 1960 (the date of final administrative denial), and September 11, 1964 (the date of filing of suit in court).

9/ The judgment provides that Rodante Lubay "take nothing herein" (J.A. 47), since he failed to appear. However, his award will be reinstated if appellant prevails (footnote 7, supra). Appellant has not sought to recover back from him the $1,581.00 he previously received.

appellant's motion and granted appellee's cross motion, holding that limitations must be computed only from the date of final denial of appellee's claim by the Veterans Administration (J.A. 43-45).

The district court then granted insurance benefits to appellee retroactive to February 1957, when her payments had been stopped. A double payment of $1,581.00 to appellee was thus required, since Rodante Lubey received installments during that same period. Appellant unsuccessfully urged that the district court limit appellee's recovery to payments accruing after the date of Rodante's suspension. (J.A. 35, 36, 46, 47).

This appeal followed (J.A. 49).

STATUTES INVOLVED

1. Gratuitous insurance benefits were authorized by Section 602(d) of the National Service Life Insurance Act of 1940, 38 U.S.C. (1952 Ed.) 802(d).[10/] That statute provided in pertinent part:

38 U.S.C. (1952 Ed.) 802(d)(3)(B):

> Any person in the active service who on or after December 7, 1941, and prior to April 20, 1942, has been or shall be captured, besieged, or otherwise isolated by the forces of an enemy of the United States for a period of at least thirty consecutive days and extending beyond April 19, 1942, and at the time of such capture, siege, or isolation by the enemy did not have in force insurance in the aggregate amount of at least $5,000 under * * * this subchapter, shall be deemed to have applied for and to have been granted * * * National Service Life Insurance in an amount which together with any such insurance then in force shall aggregate $5,000 of insurance * * *.

10/ Now repealed; the quoted provisions remain effective, as explained in footnote 1, supra.

38 U.S.C. (1952 Ed.) 802(d)(5):

> If any person deemed to have been issued insurance under subsection (d) (3) * * * (B) of this section die without filing application and within the time limited therefor, death insurance benefits shall be payable in the manner and to the persons as stated in subsection (d) (2) * * *.

38 U.S.C. (1952 Ed.) 802(d)(2):

> * * * payments hereunder shall be made only to the following beneficiaries and in the order named--
> (A) to the widow or widower of the insured, if living and while unremarried;
> (B) if no widow or widower entitled thereto, to the child or children of the insured, if living, in equal shares;
> (C) if no widow or widower entitled thereto, or child, to the dependent mother or father of the insured, if living, in equal shares * * *.

2. The jurisdictional statute governing suits against the United States for National Service Life Insurance benefits is 38 U.S.C. (1964 Ed.) 784.[11/] The following portions are relevant:

38 U.S.C. (1964 Ed.) 784(a):

> In the event of disagreement as to claim * * * under contract of National Service Life Insurance * * * between the Veterans Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States * * * in the United States District Court for the District of Columbia * * *. All persons having or claiming to have an interest in such insurance may

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11/ Title 38 of the United States Code has been enacted into positive law. Act of September 2, 1958, P.L. 85-857, 72 Stat. 1105. The limitations provisions, now consolidated in 38 U.S.C. 784(b), were long found at 38 U.S.C. 445 and 817 (1952 and prior editions of the Code). Based ultimately upon Section 19 of the World War Veterans' Act, 1924, 43 Stat. 612, as amended, those provisions were put into substantially their present form by Section 4 of the Act of July 3, 1930, 46 Stat. 992.

be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court * * *.

38 U.S.C. (1964 Ed.) 784(b):

> No suit on * * * National Service Life Insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made. For the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded. The limitation of six years is suspended for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim: Provided, That in any case in which a claim is timely filed the claimant shall have not less than ninety days from the date of mailing of notice of denial within which to file suit. After June 28, 1936, notice of denial of the claim under a contract of insurance shall be by registered mail * * * directed to the claimant's last address of record. * * * No State or other statute of limitations shall be applicable to suits filed under this section.

38 U.S.C. (1964 Ed.) 784(h):

> The term "claim" as used in this section means any writing which uses words showing an intention to claim insurance benefits; and the term "disagreement" means a denial of the claim, after consideration on its merits, by the Administrator or any employee or organizational unit of the Veterans Administration heretofore or hereafter designated therefor by the Administrator.

3. The administrative jurisdiction of the Board of Veterans Appeals is set forth generally in 38 U.S.C. (1964 Ed.) 4001-4009. Specific provisions include:

38 U.S.C. (1964 Ed.) 4004(a):

> All questions on claims involving benefits under the laws administered by the Veterans Administration

shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

38 U.S.C. (1964 Ed.) 4004(b):

> When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

STATEMENT OF POINTS

1. The district court erred in holding that the limitations period began running against appellee only from the date of final denial of her claim by the Veterans Administration, rather than from June 13, 1942, the undisputed date of insured's death.

2. The district court erred in holding that appellee's suit is not barred by the provisions of the applicable six-year statute of limitations, 38 U.S.C. 784(b).

3. The district court erred in failing to conclude that it lacks jurisdiction to grant appellee a recovery herein.

4. The district court erred in requiring appellant to make duplicate payment to appellee of insurance benefits already paid to insured's son, totalling $1,581.00, covering the period from February 13, 1957, through November 12, 1964.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant does not challenge the district court's holding that appellee qualifies as an unremarried widow.[12] Our concern here is rather with the failure of the district court to enforce the applicable statute of limitations, and with its further error in compelling double payment.

The relevant statute, 38 U.S.C. 784(b), prescribes a strict six year time limitation within which suit must be brought. This jurisdictional time limitation commenced to run against appellee when insured died. United States v. Towery, 306 U.S. 324, reh. den. 306 U.S. 668. Excluding, as the statute requires, the time between the filing of claim and its final denial by the Veterans Administration, appellee has failed to institute suit within the prescribed six year period.

The district court erroneously computed limitations only from the date of final denial. The statute cannot be so interpreted.

On this appeal, appellee may urge the doctrine of "continuing negotiations" to suspend further the running of limitations. That doctrine is properly invoked only by a claimant induced to refrain from timely suit by misleading administrative representations. In dealing with appellee, the Veterans Administration consistently adhered to the finality of its decision and did not mislead her.

12/ See Sialac v. United States, 106 U.S. App. D.C. 263, 271 F. 2d 846; Rittgers v. United States, 154 F. 2d 768 (C.A. 8); De Leno v. United States, 183 F. Supp. 781 (D.C.D.C.); Samala v. United States, 183 F. Supp. 601 (D.C.D.C.).

After the Veterans Administration terminated appellee's benefits, it was required to pay further installments to insured's son. Appellant should in no event be compelled to pay the same installments a second time to appellee.

ARGUMENT

I

THE DISTRICT COURT ERRED IN FAILING TO DISMISS THIS SUIT AS TIME-BARRED UNDER THE CONTROLLING JURISDICTIONAL STATUTE OF LIMITATIONS

A. The six year limitations period specified in 38 U.S.C. 784(b) commenced running at insured's death and expired before appellee filed this suit.

The only statute authorizing suit against the United States for National Service Life Insurance benefits is 38 U.S.C. 784. Subsection (a) thereof permits a claimant to sue "in the event of disagreement as to claim". Subsection (b), which is the controlling statute of limitations, provides that suit shall not be allowed "unless the same shall have been brought within six years after the right accrued for which the claim is made."[13/] It is "deemed that the right accrued on the happening of the contingency on which the claim is founded."

After fixing this definite time limitation upon suit, subsection (b) further provides for a suspension of limitations "for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim".

13/ This time limitation was first added to the jurisdictional statute by Section 1 of the Act of May 29, 1928, 45 Stat. 964. The purpose was to establish a uniform six year period in place of the widely varying provisions of state statutes of limitations. See United States v. Towery, 306 U.S. 324, reh. den. 306 U.S. 668; United States v. Wallace, 123 F. 2d 484 (C.A. 10); H. Rep. 1274 and S. Rep. 1297, 70th Cong., 1st Sess. The six year provision, continuously in effect thereafter, was put into its present form in 1930 (see footnote 11, supra).

Subsection (b) of 38 U.S.C. 784 in turn defines "disagreement" as meaning "a denial of the claim, after consideration on its merits".

Section 784(b) is not an ordinary statute of limitations, but rather operates as a firm condition precedent upon the power of courts to entertain veterans' insurance suits.[14/] In short, it is jurisdictional, waives sovereign immunity, and must be strictly construed. Munro v. United States, 303 U.S. 36; cf. Soriano v. United States, 352 U.S. 270; United States v. Sherwood, 312 U.S. 584.

Since National Service Life Insurance matures only upon insured's death,[15/] it is that contingency, i.e. the death of Antonio M. Lubay on June 13, 1942, upon which appellee's claim is necessarily founded. United States v. Towery, 306 U.S. 324, reh. den. 306 U.S. 668; Cole v. United States, 72 App. D.C. 118, 112 F. 2d 203, cert. den. 311 U.S. 647, reh. den. 311 U.S. 726; Samala v. United States, 183 F. Supp. 601 (D.C.D.C.); Aguilar v. United States, 183 F.

14/ Thus, plaintiff must establish facts showing timely suit as part of a prima facie case. Lynch v. United States, 80 F. 2d 418 (C.A. 5), cert. den. 298 U.S. 658, reh. den. 298 U.S. 692. Failure to sue in time operates as a bar to judgment, even though the statute was not pleaded by the Government. Morgan v. United States, 115 F. 2d 427 (C.A. 5), cert. den. 312 U.S. 701. The issue may even be raised for the first time on appeal or after entry of judgment, United States v. Mills, 91 F. 2d 487 (C.A. 6), and cannot be abrogated by estoppel. Roskos v. United States, 130 F. 2d 751 (C.A. 3), cert. den. 317 U.S. 696; Government attorneys are without authority to waive it. Munro v. United States, 303 U.S. 36.

15/ N.S.L.I. is unlike the World War I form of veterans' insurance, which matures upon either death or total permanent disability. War Risk Insurance Act, 38 Stat. 711-712, 40 Stat. 398-411; World War Veterans' Act, 1924, 43 Stat. 607-630; 38 U.S.C. (1964 Ed.) 741. See United States v. Towery, 306 U.S. 324, reh. den. 306 U.S. 668.

Supp. 598 (D.C.D.C.).[16] The statutory period therefore began running on that date.

Congress, however, provided for a tolling or suspension of limitations during the interval between filing of claim and final denial. Thus, the period is computed from date of death to date of claim, and again from date of denial to date of suit; the intervening suspension period is omitted.[17] See, for instance, Biven v. United States, 79 U.S. App. D.C. 61, 142 F. 2d 570; Aguilar v. United States, 183 F. Supp. 598 (D.C.D.C.); De Pusana v. United States, 164 F. Supp. 672 (D.C.D.C.).

Although the majority of cases in which limitations periods were computed in this manner involved claims upon which no benefits had been paid, the same computation is applicable to a situation (as here) where claim is first allowed and then later denied. Morgan v. United States, 115 F. 2d 427 (C.A. 5), cert. den. 312 U.S. 701; Bono v. United States, 113 F. 2d 724 (C.A. 2); Samala v. United States, 183 F. Supp. 601 (D.C.D.C.); contra, Tubongbanua v. United States, 223 F. Supp. 379 (D.C.D.C.).

16/ Accord: Prado Del Castillo v. United States, 272 F. 2d 326 (C.A. 9), cert. den. 361 U.S. 966 (gratuitous insurance); United States v. Siegel, 225 F. 2d 869 (C.A. 9); United States v. Willhite, 219 F. 2d 343 (C.A. 4); Riley v. United States, 212 F. 2d 692 (C.A. 4); Roskos v. United States, 130 F. 2d 751 (C.A. 3), cert. den. 317 U.S. 696; Morgan v. United States, 115 F. 2d 427 (C.A. 5), cert. den. 312 U.S. 701; Bono v. United States, 113 F. 2d 724 (C.A. 2); De Yaranon v. United States, 152 F. Supp. 644 (D.C.D.C.) (gratuitous insurance); Williams v. United States, 134 F. Supp. 333 (E.D.N.C.); Prifti v. United States, 37 F. Supp. 121 (D. Mass.); Annotation, 44 A.L.R. 2d 1189-1191.

17/ See footnote 8, supra.

B. The statute does not contemplate or permit the computing of limitations only from the date a claim is denied.

In the present case, Judge Holtzoff of the district court declined to follow the established interpretation of 38 U.S.C. 784(b), as outlined above, and erroneously computed limitations only from January 12, 1960, the date of final administrative denial (J.A. 43-45). He thus followed his previous ruling in Tubongbanua v. United States, 223 F. Supp. 379 (D.C.D.C.), and held that the usual computation does not apply where the Veterans Administration denies a claim after first paying claimant some of the benefits.

These twin rulings by Judge Holtzoff stand alone; the statute has never been so interpreted in any other case. They directly conflict with Samala v. United States, 183 F. Supp. 601 (D.C.D.C.).[18/] Judge Youngdahl there explained in detail his limitations computation:

> Plaintiff's claim accrued at the death of her husband, Ysidoro Samala, on April 30, 1942. More than three years and ten months elapsed before March 15, 1946, when the plaintiff filed her claim with the Veterans Administration and this period of time "counts" towards the running of the six years. * * * Between March 15, 1946 (claim filed) and May 3, 1955 (the Board of Veterans Appeals' denial of plaintiff's appeal), it is clear that the express language of §784(b) suspended the statute of limitations. Suit was filed on October 13, 1959, some four years and five months after the administrative denial of May 3, 1955, and adding this

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18/ The facts in Samala and Lubay are indistinguishable. Mrs. Samala's insured died in 1942, as did Mrs. Lubay's. Mrs. Samala filed claim in 1946, Mrs. Lubay in 1945. Both were awarded monthly benefits, both received payments for some years, and both were terminated for remarriage. Mrs. Samala's appeal was denied in 1955 and Mrs. Lubay's in 1960. Mrs. Samala sued in 1959, less than five years after her denial, and this was held to be too late. Mrs. Lubay sued in 1964, also less than five years after denial.

> period of time to that which the plaintiff had already consumed prior to filing her claim (three years and ten months), it can be seen that some eight years and three months of "countable" time ran prior to the institution of this lawsuit, making it late by about two years and three months. [183 F. Supp. at 602, 603]

At least three other district court judges have followed this reasoning in similar cases.[19] One of those district court rulings was affirmed in 1965 by this Court.[20] Although the per curiam affirmance (J.A. 39-42) is not published, we feel it should be deemed controlling here, since the facts (J.A. 37, 38) are on all fours with those of the present case.

The basic correctness of the Samala approach is amply demonstrated by United States v. Towery, 306 U.S. 324, reh. den. 306 U.S. 668, the leading case. Towery teaches that only one "contingency" is created by 38 U.S.C. 784(b), and that after it occurs no subsequent event can constitute a new "contingency" for purposes of suit.[21]

19/ Pelagia G. Vda de Reynoso v. United States, Civil Action No. 1015-63 (Tamm, J., September 19, 1963); judgment was affirmed by this Court (footnote 20, infra). Mrs. Soledad A. Vda de Dampitan v. United States, Civil Action No. 634-65 (Corcoran, J., October 13, 1965). Lucila Hipolito Vda de Almayda v. United States, Civil Action No. 2248-64 (Gasch, J., March 25, 1966). In each case, the widow was awarded and received benefits, was cut off, sued less than six years thereafter, and was held barred by limitations.

20/ Pelagia G. Vda de Reynoso v. United States, footnote 19, supra, No. 18,360 in this Court, which was combined on appeal with Dolores C. Vda de Monge v. United States, No. 18,359. The judgment of affirmance was issued on January 6, 1965 (J.A. 39, 40), this being amended by order dated May 10, 1965 (J.A. 41, 42). The latter specifically cites Samala, implying full approval of Judge Youngdahl's reasoning. Application of that reasoning was in fact necessary to decision in Reynoso (J.A. 37, 38).

21/ As stated in Towery (306 U.S. at 330, 331):

> We think the legislation and the policy do not confer two rights. the beneficiary's interest in the policy

(footnote continued on following page)

A form of the Semala interpretation was applied in Morgan v. United States, 115 F. 2d 427 (C.A. 5), cert. den. 312 U.S. 701, and Bono v. United States, 113 F. 2d 724 (C.A. 2).[22] Also significant in this connection is the per curiam decision in Sinlao v. United States, 106 U.S. App. D. C. 263, 271 F. 2d 846.[23]

(footnote continued from preceding page)

> is derivative from that of the veteran. It may be taken away by legislation, even after the death of the insured. There are different events upon the happening of which the payment of benefits to the veteran or to his beneficiaries or to his estate depend. We think it highly unlikely that Congress intended to accord each of the claimants of possible benefits under the policy six years from the time any installment or lump sum payment fell due within which to bring suit. * * * A reading of the section as a whole is persuasive that what Congress intended by "the contingency upon which the claim is founded" was the contingency on which liability under the policy was bottomed, namely,-- permanent disability or death while the policy remained in force. * * * We think then that, reasonably construed, the section provides that there shall be but one right,--that is, the right to benefit payments, and but one critical contingency which conditions that right, namely, the occurrence of permanent total disability or death while the policy remains in force.

Towery dealt with the World War I form of insurance, maturing upon either death or total permanent disability (see footnote 15, supra). However, the statute which it interpreted, now 38 U.S.C. 784(b), applies equally to National Service Life Insurance, which matures only upon death.

22/ Morgan was very similar to the present case. Insured died in 1918, and his widow was later granted benefits which were soon discontinued because of her illicit cohabitation. She sued less than six years thereafter, but was held barred. The Fifth Circuit stated that payment of "certain of the installments * * * could not operate as a waiver of the defense of limitations" (115 F. 2d at 429). In Bono, the Government made 132 installment payments to a beneficiary and then terminated them. The beneficiary, suing five months thereafter, was held barred because the "contingency was the death of the insured in 1918 and not the refusal of the government to pay installments which thereafter fell due." (Second Circuit, 113 F. 2d at 725).

C. The doctrine of "continuing negotiations" is inapplicable to this case.

In an endeavor to avoid the time bar of 38 U.S.C. 784(b), appellee urged the doctrine of "continuing negotiations" in the district court. That doctrine has been employed in instances, unlike the present case, where the Government actively induced a claimant to postpone suit by intimating that denial of claim was not final. In such cases, some courts have refused to accord finality to the alleged denial and have considered limitations as remaining suspended until some later date. Examples of such decisions include United States v. Bollman, 73 F. 2d 133 (C.A. 8), and De Pusana v. United States, 164 F. Supp. 672 (D.C.D.C.).

However, the present case bears much closer resemblance to Samala v. United States, 183 F. Supp. 601 (D.C.D.C.), where the district court refused to resort to the doctrine of "continuing negotiations" despite a correspondence which persisted for years between claimant and the Veterans

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(footnote continued from preceding page)

23/ There gratuitous insurance benefits had been first allowed and then terminated, although more than six years thereafter elapsed before suit was filed. In commenting on the action of the district court in dismissing the complaint, however, this Court stated:

> The court rightly held that suit on the insurance claim was barred because not brought within the time required by statute, namely "within six years after the right accrued for which the claim is made. * * *" 38 U.S.C. §784(b). [271 F. 2d at 847]

In view of the authoritative interpretation of this language in Towery, it seems reasonable to conclude that the Court had the death of insured in mind when making these remarks.

Administration. Judge Youngdahl held that claimant could not reasonably have concluded from the tenor of such correspondence that her claim was still under consideration.

On the four occasions when it wrote Mrs. Lubey (J.A. 22, 25, 30, 32), the Veterans Administration firmly advised her that no further administrative action on her claim could be expected.[24/]

The substantial periods of time elapsing between appellee's communications also militate against applicability of the doctrine.[25/] See Dyer v. United States, 81 U.S. App. D.C. 4, 154 F. 2d 14, cert. den. 329 U.S. 722.

II

APPELLANT SHOULD NOT BE REQUIRED TO MAKE DUPLICATE PAYMENT TO APPELLEE OF INSURANCE BENEFITS ALREADY RECEIVED BY INSURED'S SON

After appellee's award was terminated, the Veterans Administration paid further insurance installments to insured's son, Rodante Lubey, during the period from February 13, 1957, through November 12, 1964, for a total of $1,581.00 (J.A. 19). It was required to make those payments under the statutory scheme.[26/]

24/ The first of these was the denial letter itself (J.A. 22), which firmly stated that "this decision constitutes final administrative denial of your insurance claim." The second letter (J.A. 25) reiterated that advice. The third (J.A. 30) indicated that no change was warranted "in the prior action taken by this office." The last or fourth letter (J.A. 32) said practically the same thing.

25/ The Board acted in January 1960, and benefits were then awarded to insured's son. Appellee wrote in February 1960, but did not write again until October 1961; her final letter was sent in April 1962. She then delayed suit until September 1964. (J.A. 18, 19).

26/ See footnote 6, supra.

We submit that it was error for the district court to compel (J.A. 47) a second payment of that money to appellee. The Government should have been allowed a proper credit for benefits paid to a member of appellee's own family. See Whiting v. United States, 74 App. D.C. 148, 122 F. 2d 196, and Riley v. United States, 116 F. Supp. 155 (N.D.W.Va.), affirmed on other grounds, 212 F. 2d 692 (C.A. 4).

Of course, if appellant prevails on the basis of the statute of limitations, this further error of the district court need not be reached. Double payments would not be required in that event.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below should be reversed.

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SEPTEMBER 1966

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,358

UNITED STATES OF AMERICA,

Appellant,

v.

LEONARDA M. vda deLUBAY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

In the opinion of Appellee the basic questions are:

1. Whether the statute of limitations contained in 38 U.S.C.784(b) commenced running against appellee upon administrative termination of her existing Veterans' Administration Award of Gratuitous National Service Life Insurance (and not from the date of death of her veteran husband), thus preventing a jurisdictional bar to the maintenance of this suit.

2. Whether the appellant, by its own error in improperly and unlawfully terminating appellee's benefits on the ground of a common law marriage, which does not exist in the Philippines, tolled the statute of limitations, thus preventing a jurisdictional bar to the maintenance of this suit.

3. Whether the appellant improperly paid benefits due and owing to appellee to another at its peril.

INDEX

CITATIONS

Cases:

Statutes:

SUMMARY OF ARGUMENT

The six year period of limitations as prescribed by 38 U.S.C.784(b) cannot be uniformly applied to two divergent fact situations and still fulfill the intent of Congress to compensate widows and orphans for the loss of their serviceman husbands and fathers.

A distinction must be made between the original claim which is filed but never granted in which the final denial of said claim becomes important, and the original filing of a claim which is granted and paid over a number of years, and then is terminated. In the later case there is never a denial of a claim but rather termination of a claim upon specified statutory grounds. As a corollary, the statute of six years is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon, and the denial of said claim.

Appellee agrees that the six year statute of limitations begins to run at the date of death of the death of the veteran in the case where a claim is filed, never allowed and is denied, as being the happening of the contingency upon which the claim is founded.

Appellee contends however, that the six year statute of limitations begins to run on the date of

termination of benefits in the case where a claim has been filed, granted and paid over a number of years, and then is terminated on statutory grounds. The termination date, and not the date of death of the veteran, is the happening of the contingency which, for the first time in the chain of events, permitted appellee to file suit.

Appellee contends alternatively that, in ~~the~~ ANY event proper application of the "doctrine of continuing negotiations" would prevent the statute of limitations from barring her suit where the Veterans' Administration willfully and knowingly applied incorrect principles of law to terminate her benefits and deliberately mislead appellee into believing that the submission of further evidence would cause it to reverse the termination of benefits.

Appelle's son was a secondary beneficiary under the statute and when appellant voluntarily paid the secondary beneficiary without a judicial determination of entitlement, it did so at its peril. Appellee should not be made to suffer for the mistakes of the appellant.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY RULED THAT THIS SUIT WAS NOT BARRED UNDER THE CONTROLLING STATUTE OF LIMITATIONS

A. The six year limitations period specified in the 38 U.S.C.784(b) commenced running at date of final termination of benefits previously awarded and did not expire before appellee filed this suit.

Appellee, the widow of a deceased veteran Philippine Scout, applied for and was granted gratuitous National Service Life Insurance as the statutory beneficiary under the provisions of 38 U.S.C.(1952 Ed.) 802(d)(2) which provided that "***payments hereunder shall be made only to the following beneficiaries and in the order named --(A) to the widow or widower of the insured, if living and while unremarried; ***".

The right of a statutory beneficiary to bring suit on gratuitous National Service Life Insurance, and the time in which suit must be brought is contained in 38 U.S.C.784. Subsection (b) provides that suit shall not be allowed "unless the same shall have been brought within six years after the right accrued for which the claim is made". It is

"deemed that the right accrued on the happening of the contingency on which the claim is founded".

Subsection (a) of 38 U.S.C.784 permits a claimant to sue "in the event of disagreement as to claim ***".

The deceased serviceman, Antonio M. Lubay, is presumed to have died on June 13, 1942. On September 21, 1945, after cessation of hostilities, appellee, as widow, filed her claim with the Veterans' Administration. This claim was allowed and benefits were paid to appellee until the same were suspended in February 1957. From February 1957 toJanuary 12, 1960, for a period of three years, the Veterans' Administration conducted an investigation of Appellee's marital status. On January 12, 1960, appellant notified appellee that her benefits were being terminated as of February 1957. At no stage in the proceeding was appellee's claim denied, and at no time did she have a right to file suit until first complying with her administrative remedies. The right to sue arose for the first possible time on January 12, 1960. (Emphasis supplied).

Judge Alexander Holtzoff of the United States District Court For The District of Columbia, distinguished between denial of original claims and termination of benefits on statutory grounds, in

the case of Tubongbanua v. United States, 223 F. Supp.379 (D.C.D.C.), where he stated:

> "admittedly, this suit was filed with reasonable promptness after the Veterans' Administration discontinued payments that it had been making for a long period of time and if the statute of limitations commenced to run on the date of the discontinuance, then concedely the action is not barred. The Government, however, takes the position that the period between April 6, 1942, when the death occurred, and June 20, 1947, when the claim was originally filed, should be taken into consideration as part of the period of limitations. The Court disagrees. There was no reason for the plaintiff to bring any suit. In fact, there was no basis for any suit so long as the claim had been allowed and benefits were being paid. The right to bring suit arose when payments were discontinued and the claim was repudiated". (Emphasis supplied).

The Government cites for support of its position, the cases of Morgan v. United States, 115 F2d 427 (C.A.5.), cert.den.312 U.S.701, and Bono v. United States, 113 F2d 724(C.A.2). Judge Holtzoff in Tubongbanua v. United States supra, disposes of these two cases by saying

> "as to Bono v. United States, and Morgan v. United States, these two decisions are not authoritative, neither are they persuasive, since they interpreted an earlier statute under which a policy matured not only in the event of death but also in the event of total and permanent disability".

Appellant further cites the case of Samala v. United States, 183 F.Supp 601 (D.C.D.C.) in support of its computation of the running of the statute of limitations. The Samala case preceded the Tubongbanua case and was argued before Judge Youngdahl by Counsel for Appellee in the present case. The Samala case concerned itself entirely with the "doctrine of continuing negotiations", and did not present to the Court for determination, the distinction in fact s tuations which was presented to the Court in Tubongbanua. The Samala case, therefore, is not in conflict with Tubongbanua on the question of determining the date from which the statute commenced to run.

The Government did not file an appeal in the Tubongbanua case. The Government further admits (Govt.Brief p.13), that the majority of cases in which limitations were computed in the manner advanced by the Government, involved claims upon which no benefits had been paid. There is no basis legal or equitable, for extending appellant's fallacious interpretation of the statute of limitations.

In the event an ambiguity exists in the statute of limitations, this ambiguity should be resolved in favor of appellee. As was stated by this Court

in United States v. Philippine National Bank, Guardian for Salvador Tranas, Jr., a minor, 110 U. S. App.D.C.250,292 F2d.743, decided May 18, 1961:

> "The provision for gratuitous insurance was generous legislation, plainly adopted for humane and patriotic reasons".
>
> "The Supreme Court has said of this Act, 'The statutory provisions, where ambiguous, are to be construed liberally to effectuate the beneficial purposes that Congress had in mind'. United States v. Zazove, 334 U.S. 602, 610".

The statute of limitations commenced running against appellee on January 12, 1960, and suit was filed on September 11,1964, well within the six year period; therefore, the suit was timely filed.

B. The six year limitations period specified in 38 U.S.C.784(b) was tolled from September 21,1945, the date of filing of appellee's claim, until June 8, 1962, the date of final denial, and appellee's suit was well within the six year period.

In the event the Government's theory as to the computation of the statute of limitations from the date of death of the veteran, in all cases, is found persuasive, appellee's claim is still not barred because of the tolling of the statute as provided therein and as amplified by the doctrine of continuing negotiations in case law.

The veteran died on June 13, 1942, and appellee's claim was filed on September 21, 1945, a period of approximately three years and three months. The statute 38 U.S.C.784(b) provides:

> "*** The limitation of six years is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim,***"

This statutory provision is amplified by the case of United States v. Bollman, 73 F2d.133,135 (C.A. 8,1934) which states as follows:

> "However, the record shows further communications establishing that there were continued negotiations between claimant and the Government with a view to having this action set aside, and that such negotiations were permitted by the Bureau, and, in a sense, participated in by it.***We hold that so long as this order was under serious discussion in the Bureau and until it finally declined to reopen the matter the Order should not be deemed final for application of limitations against suit. ***"

Appellee's benefits were suspended by the Veterans'

Administration on February 12, 1957, pending investigation of her marital status. On June 4, 1957, Appellee was notified of the termination of her benefits. Appellee filed a formal appeal from the termination of her benefits and was notified by letter dated January 12, 1960, that her appeal from the termination of her benefits had been denied. The denial was based on a completely false representation of law to appellee that, "An inference of your remarriage has been created by your having lived with another man since July, 1954". Appellee rebutted this "inference" by submitting a copy of the marriage certificate of her alleged paramour to another woman, which marriage took place in 1948, and had never been dissolved, with appelle's letter of Feb.23,1960. The Government replied to this submission of additional evidence in March, 1960, by stating to appellee that "Since the evidence in its entirety did not rebut the inference of remarriage, your appeal was denied". The Bureau then invited appellee to submit further evidence by saying, "Further action on your claim by this Board is not indicated at this time". Appellee, therefore, by letter dated October 4,1961, submitted additional evidence by affidavits and on April 30, 1962, submitted additional evidence

by way of an insurance policy showing the legal wife of her alleged paramour, Dionisia Torres de Castro, to be his beneficiary. On June 8,1962, the Government informed appellee that her evidence had been considered but no change in its prior action was warranted. From June 8,1962, until September 11, 1964, the date of filing suit, an additional two years and three months of the statute ran, making a total of five years and six months and, hence, appellee's claim was not barred by limitations.

In the case of Samala v. United States, 183 F.Supp.601 (D.C.D.C.), Judge Youngdahl, in referring to the doctrine of continuing negotiations, said:

> "Thus it is clear that each case must depend upon its own factual makeup."

In dePusana v. United States, 164 F.Supp.672 (D.C.D.C.)1958), the Court pointed out that the doctrine of continuing negotiations must be employed in appropriate situations or else,

> "it would be possible for the Veterans' Administration to mislead unsuspecting claimants by holding out the possibility of changing its decision and obviating the necessity of Court action".

The fact situations in Samala and the present case are markedly different in that here we are concerned with the presentation of additional evidence

of considerable merit and not just an exchange of correspondence.

In the case of Sinlao v. United States, 106 U.S.App.D.C. 263,271 F2d 846, this Court said:

> "The Administrator's rejection of appellant's compensation claim cannot be reconciled with the intention Congress has expressed".

Even with a pronouncement from this Court, the villainy of the Veterans' Administration continues flagrant and unabated. Appellee's right to recover is dependant upon her legal status and not upon her morals, her worthiness, nor her social standing. Rittgers v. United States (1946) 154 F2d 768.

The United States Government, through the Veterans' Administration, should not be permitted to deliberately misquote the law and misinform poor, uneducated people as to their rights with the intent that such misinformation be relied upon to their detriment, and it is so relied upon. What better evidence can there be of a pre-existing marriagethan a valid marriage certificate of the paramour to another woman? The Philippines is a Civil Law Jurisdiction and common law marriages are not recognized in the Philippines..

Lembcke v. United States (1950) 181 F2d 703; Erickson v. Stogner (1952) 195 F2d 777, 90 U.S. App. D.C. 279; deCartas v. United States (1956) (U.S.D.C.D.C.#2121-56).

II

APPELLANT IMPROPERLY PAID A SECONDARY BENEFICIARY BENEFITS DUE AND OWING TO APPELLEE AT ITS OWN PERIL

Appellant improperly terminated benefits due and owing to Appellee as statutory beneficiary of gratuitous National Service Life Insurance. Appellee should not be made to suffer for the wrongdoing of Appellant.

Appellant could have filed an action for declaratory judgment, and completely resolved the legal status of the parties and their statutory entitlement. In paying a secondary beneficiary without a judicial determination of entitlement, Appellant became a volunteer, and made said payments at its peril.

CONCLUSION

This Court may confirm the decision of the Court below by adopting the arguments advanced in Section I. A. of this Brief. Alternatively, the Court may confirm the decision by adoption of the arguments advanced in Section I.B.

In either event, the intent of Congress in carrying out the statutory enactment will be accomplished.

For the above reasons, it is respectfully submitted that the decision of the Court below be affirmed.

ROBERT L. PILLOTE,
Court Appointed Counsel

OCTOBER, 1966

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